THE YALE LAW JOURNAL ONLINE

ETHAN J. LEIB & MICHAEL SEROTA

The Costs of Consensus in Statutory Construction

Finding methodological consensus for statutory interpretation cases is all the rage these days.[1] Some in the academy sing the praises of a singular judicial approach to questions of statutory interpretation and bemoan the frustrations associated with judges implementing a mélange of interpretive techniques. And now, thanks to Abbe Gluck's authoritative article, *Laboratories of Statutory Interpretation*, proponents of interpretive uniformity have evidence that some state courts seem to be applying methodological stare decisis to decide questions of statutory interpretation. After exhaustive reading and analysis of state statutory interpretation cases—cases that have received far less attention than their federal counterparts—Gluck describes several important developments in state legisprudence that she thinks may have significant implications for the federal system.

But the normative thrust of her work gives us pause. Although Gluck offers several caveats that qualify her normative conclusions, she is essentially committed to two views: that interpretive consensus in statutory interpretation is an important value[2] and that the version of interpretive consensus employed by the state courts in her case studies, a method she calls "modified

1. *See* Abbe R. Gluck, *Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

2. *Compare* Gluck, *supra* note 1, at 1848 ("A premise of this Article has been that settling on a consistent approach is a worthy goal for statutory interpreters."), *with id.* at 1849 ("[T]he benefits of a consistently applied, ex ante-announced interpretive methodology *might* outweigh the costs of loss of flexibility in the statutory context . . . .") (emphasis added).

textualism," is a normatively attractive compromise between the main claims of textualists and purposivists.[3] Neither of these contentions, however, is particularly convincing.

There are significant costs to methodological consensus that are given scant consideration by Gluck or by many others in the academy who sound the battle cry of interpretive uniformity. Moreover, even assuming the "modified textualist" regime she presents can work in a sustainable way (and we will proffer reasons for skepticism here), it suffers from serious difficulties related to these costs that ultimately render it an unappealing alternative to the more discretionary approach that the majority of federal and state courts currently apply. It is not just that we are getting by with a "consistent *enough*" interpretive regime on the federal side.[4] Rather, there are distinctive, underappreciated benefits that result from methodological diversity and make our current regime of dissensus a more desirable approach.

This Essay proceeds in two Parts. First, we argue that dissensus provides significant benefits to our judicial system that not only merit our attention but justify the rejection of any form of methodological stare decisis requiring judges to follow fixed regimes that categorically ignore a statute's etiology or the processes used to enact it. Second, we argue that there are serious costs to the kind of methodological stare decisis Gluck has explored and that careful attention to the benefits of dissensus demonstrates that modified textualism is, in the end, normatively unattractive.

I. THE DIFFERENCE DISSENSUS MAKES

The benefits of uniformity are easy to specify—or at least to speculate about: parties, citizens, and lawyers might better know what to expect from their statutes, how to argue their cases, and what sources to mine to convince courts that their readings are correct. Predictability is easy to sell when it comes to legal design, and advocates of consensus trade on rule-of-law themes to make their cases.[5] It is also easy to highlight the costs of failing to agree on a consistent methodology for statutory interpretation: the uncertainty could add

3. *Compare id.* at 1829-44 (arguing that modified textualism is an attractive compromise for textualists and purposivists), *and id.* at 1856 ("My argument . . . is about identifying a methodology that is both normatively attractive . . . and also likely to generate consensus."), *with id.* at 1846 (claiming that "modified textualism is [not] the only possible, or 'best' answer" to all our methodological problems).

4. *Id.* at 1767.

5. Rule-of-law arguments pervade Gluck's monograph. *See, e.g.*, *id.* at 1767-78, 1851-53, 1854-55.

unnecessary burdens to managing a docket, citizens might lack fair notice about what the law requires, and parties may not know the most effective arguments to make before adjudicators. Ultimately, although we think the costs of dissensus and benefits of uniformity are often overstated, the independent value of interpretive dissensus is wildly undervalued, if not overlooked entirely. This Part makes the affirmative case for the core values of interpretive diversity.

To be fair, even without methodological uniformity, there is already some consensus about the plausible goals for courts to strive toward and the credible sources available for them to use in the statutory inquiries. One basically can be a textualist, an intentionalist, or a purposivist—and use text, structure, textual and substantive canons, public values, purposes, or legislative history to draw conclusions about meaning. But this generally agreed upon set of goals and sources is not the sort of consensus we are assessing here.[6] Rather, those who argue for singular interpretative regimes want consensus about which mix of these goals and sources is appropriate and how that mix should be utilized for all judicial decisions involving questions of statutory interpretation. It is the cost of that kind of consensus that is routinely overlooked and that we try to illuminate here. We offer two arguments below to support the value of interpretive dissensus: (A) dissensus induces deliberative and transparent contestation, redounding to the benefit of deeper rule-of-law values; and (B) dissensus is conducive to the sheer variety of statutory products that is subject to judicial interpretation.

A. Inducing Deliberative and Transparent Contestation

Dissensus creates a system of open deliberation that has a significant impact on our legal system and creates tangible benefits. Interpretive diversity makes each judge work hard to find compromises, render the strongest argument utilizing all credible sources available, and take seriously all types of arguments to achieve the best result within the range of permissible interpretations. This type of diversity also allows our legal system to absorb a mix of the values underlying various interpretive approaches that might not otherwise be produced in a unified interpretive regime.

The world of statutory interpretation benefits from having aggressive textualists, committed intentionalists, and dynamic purposivists in a single

6. Even this limited type of consensus regime might be subject to criticism. For a provocative example thereof, see Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. (forthcoming 2010).

judicial system because it requires each adherent of an interpretive approach to engage others to argue for a preferred result. If the whole Court embraced a strict textualism, we would lose some of Justice Scalia's most thoughtful opinions; when he digs through legislative history—even if only to undermine his opponents—his arguments are stronger and more persuasive, not less so.[7] So too when Justice Stevens engages with strong textual arguments against his more clearly intention- and purpose-driven decisions, he is forced to build a more complete case that takes the text more seriously.[8] Without an openness to dissensus, we would likely see more doctrinaire and less deliberative judicial decisionmaking in statutory cases.[9]

To be sure, interpretive consensus might streamline some of the easy cases, but it will not necessarily aid in all of them. For example, in some instances, it might bind judges to a clear but misleading text that sits in obvious tension with what the legislature wanted. An ambiguity might, after all, be "extrinsic," arising only after resorting to extra-textual evidence. Yet that very evidence could be excluded in a consensus regime that allows consideration of only text at the first stage.[10] And when it comes to the really difficult cases that make it to a second or third tier of review, the goal is not, we think, to decide cases as cheaply as possible. Here, quick and easy mechanized decisions exact their own costs on judicial legitimacy—and society more broadly—because difficult statutory questions often require the consideration of a variety of circumstances for which interpretive uniformity cannot account. Accordingly, Gluck's footnotes demonstrate that many judges who are forced into a methodological consensus regime admit that it often produces poor results.[11]

7. Two important Scalia opinions that marshal purposivism and legislative history to powerful effect include his dissents in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 726-29 (1995); and *Chisom v. Roemer*, 501 U.S. 380, 405, 417 (1991).

8. Justice Stevens's opinions in both *Babbitt*, 515 U.S. at 698-704, and *Chisom*, 501 U.S. at 396-402, evidence seriousness about text that would seem unnecessary if there had been methodological consensus around intentionalism or purposivism.

9. This argument is a cousin to that made by Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (intervening in the old rules-versus-standards debate with the observation that standards leave room for citizen deliberation and moral reflection in a way rules cannot).

10. Some classic "extrinsic ambiguity" cases in the contracts canon include *In re Soper's Estate*, 264 N.W. 427 (Minn. 1935) (finding that although "wife" has only one meaning with a purely textual inquiry, a resort to extra-textual sources reveals that in the text at issue, the word "wife" actually had the purpose to designate a second, though illegal and invalid, "wife"); and *Columbia Nitrogen Corp. v. Royster*, 451 F.2d 3 (4th Cir. 1971) (finding that although the face of the contract required a specific quantity as a minimum, extra-textual sources infuse the minimum quantity clause with a much more flexible meaning).

11. Gluck, *supra* note 1, at 1781 n.107.

Poor results driven by a constructed and stiff consensus regime also undermine the very rule-of-law values that those favoring methodological stare decisis routinely invoke to support their methodological preferences. Litigants want to know that they will get a full and fair hearing and that their claims will be taken seriously, subject to serious deliberation by adjudicators and decisionmakers. It is not enough to tell them that judges will be bound by inflexible rules that control the outcome; judges are more than mere umpires calling balls and strikes, especially when it comes to deciding difficult cases of statutory interpretation.[12] The "expressive" value of the rule of law requires that litigants know that the law will actually listen to their claims, rather than mechanically superimpose itself on them.[13]

Just as living in an "echo chamber" disables the full development of a meaningful debate,[14] a panel of judges who prioritize different sources and goals in statutory interpretation is more likely to generate productive, useful, and important dialogue about the difficult issues before them. While such an arrangement surely creates some level of uncertainty in the judicial process, we think this uncertainty is unavoidable even if judges are forced to write opinions through the framework of methodological stare decisis. We would encourage courts to work within the permissible range of goals and sources for statutory interpretation to come up with a thoughtful, respectful, and fair application of a statute in a given case. Trying to force a complex cognitive process such as statutory interpretation into a narrow framework will ultimately produce misguided and potentially misleading decisions on the difficult cases with little gain for the easy ones. Hard cases require debate, contestation, transparency, and an airing of all grievances, and we think that is something only dissensus can provide. Candor—at least on a systemic level—is more likely to result from giving judges the ability to marshal all credible sources to make the strongest arguments possible. Like other interpretive pragmatists before us, we think intellectual honesty is a virtue, one that toleration of dissensus is more likely to promote.[15] But although we would probably be "pragmatists" of a sort if we were judges ourselves (rejecting each foundationalist theory of statutory interpretation), our meta-theoretical commitment here is slightly different: we

12. *See* Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 119-20 (2010), http://yalelawjournal.org/2010/03/03/zelinsky.html.

13. *But see* Gluck, *supra* note 1, at 1854-55 (explaining her version of "expressive" rule-of-law benefits).

14. *See* CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2009); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2005).

15. *But see* Zuni Pub. Sch. Dist. v. Dep't of Educ., 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) ("Intellectual honesty does not exclude a blinding intellectual bias.").

are actually pleased that all judges are not pragmatists. A panel of judges who were all pragmatists could do worse for the system of statutory interpretation than a mixed panel that was forced to wrestle with the underlying values that each foundationalist theory of statutory interpretation promotes.

Indeed, the value of this judicial engagement with the panoply of acceptable interpretive tools runs deep. Because the conventional schools of statutory interpretation are all based on legitimate constitutional values and highlight different normative concerns regarding the relationship between the judiciary, the legislature, and society, our legal system would suffer from the elimination of any single methodology or the prioritization of one group over others for all statutory questions. Consistent and enduring interaction between these various interpretive approaches results in a legal system that incorporates a vital mix of the values underlying each school of interpretation.

This mix is not only desirable from an instrumental perspective (to promote better decisions that might redound to the sociological legitimacy of the republic), but it also builds moral credibility within a democratic political morality. Because of the close relationship between electoral politics, judicial appointments, and interpretive approaches, the judiciary risks hermetic isolation from political choice under a consensus regime. When a President or governor is elected, his constituents may very well expect him to appoint judges that take a particular approach to statutory interpretation; state judicial elections may well turn on citizen preference for one interpretive approach over others in a given election cycle.[16] Dissensus pays respect to democratic preferences over time, without restricting newly elected or appointed judges to methodologies that have not been politically vetted—or, indeed, that have been politically rejected.

To be sure, *Laboratories of Statutory Interpretation* and other articles seeking uniform methodologies are sympathetic to lists and hierarchies because they look "law-like." But we should resist rules for the sake of rules: the appearance of the rule-of-law that papers over foundational disagreements about the proper role of the judiciary is detrimental to our legal system. Allowing litigants to make all credible arguments to their adjudicators and letting those adjudicators say what they really think—that is, what was most persuasive to them—is more likely to incentivize productive, pragmatic, and democratic

16. To wit, it sounds like Michigan's interpretive consensus is coming apart at the seams because of judicial elections that reflected the people's lack of sympathy with the consensus reached in prior cycles of decisionmaking. *See* Gluck, *supra* note 1, at 1808-11. Although Gluck seems to decry the development of interpretive methodology becoming politicized, we basically welcome it; if only all judicial elections and appointments turned on something so substantive and so tied to judicial temperament and philosophy!

deliberation. We should avoid regimes that encourage falsification and hiding behind a false consensus.

B. Different Statutes Require Different Interpretive Approaches

Interpretive consensus is reductive not only because it can exclude consideration of relevant sources of meaning but also because it treats all statutes the same way. Consensus ignores the reality that different statutory contexts may warrant different methodological approaches. Legislation cuts across time, place, and subject matter, and thus rigid methodological regimes are likely to disable more careful attention to differences between classes of statutes. The alternative—to tailor interpretive regimes to the variety of statutes that exist—is a kind of pragmatism, to be sure, but it receives little attention in Gluck's article because she remains attracted to the search for a unified field theory in statutory interpretation.[17] But there are different classes of statutes, not all mutually exclusive: common law statutes, criminal law statutes, "super statutes," rent-seeking statutes, and statutes passed through direct democracy—to name only a few. This diversity of statutory product would be hard to address with a one-size-fits-all approach to statutory interpretation. The solution, however, is neither to scrape away a small class of statutes that merit a specialized regime nor to press for a particular specialized regime for each class of statutes. Rather, as we explain below, there simply are too many varieties of statutes to make it seem worthwhile to reduce them all into one general methodology.

In the world of what are sometimes known as common law statutes, broad delegation to the judiciary is uncontroversial, and the legislature expects judges to develop the law over time by utilizing a free-form common law method. This is what might be called the enactor's "meta-intent." The easiest example of this sort of legislation is the set of statutes passed by state legislatures to encode features of the common law of torts and contracts with the understanding that common law will continue to develop, unencumbered by a

17. In correspondence with Professor Gluck about our Essay, she indicated that she believes her article did not preclude interpretive diversity to account for different types of statutes. E-mail from Abbe Gluck to author (June 7, 2010, 13:55 PDT) (on file with author). We leave to her future work to make clear how she can accommodate such diversity within a consensus regime of modified textualism. But we think it is instructive that no discussion of this issue made it into a hundred page article that treated two states—Oregon and Texas—that would seem to invite it. Oregon is an extremely active direct democracy state, and Gluck's article reports that Texas's criminal and civil courts diverge in methodology.

frozen meaning or intent at the time of enactment.[18] It is routine for courts—appropriately, we think—to treat common law statutes as a type of authorization for fine-tuning over time rather than as a directive to follow their language or specific intent in a cabined manner. Indeed, substantive and textual canons that encourage courts to render statutes consistent with common law meanings seem particularly appropriate in this class of statutes, as do interpretive directions to interpret statutes "liberally." An example on the federal side in which Congress seems particularly open to common law development by courts is antitrust law; textualism is contraindicated here and purposivism prevails.[19] But just because purposivism prevails in this domain does not mean that it should prevail everywhere.

For example, take criminal law as a whole. Those who argue for singular regimes would consequently force criminal statutes to be read in the very same way in which civil rights statutes or public entitlements statutes are read.[20] This would be troublesome; indeed, many people who generally consider themselves sympathetic to purposivism or intentionalism reasonably get worried when that methodology gets applied in the criminal law and sentencing contexts. Here, there might be greater attraction in substantive canons, like the Rule of Lenity, that override the search for implied text or intent or purpose in criminal cases, forcing legislatures to be absolutely clear when they want to interfere with a defendant's life or liberty.[21] We think it would be unfortunate to force our courts to lock themselves into a regime that forbids judges from resorting to substantive canons that may be appropriately tailored to a specific class of statutes. It may very well be that we want a textualism of sorts in criminal law, but one informed by prioritizing a particular substantive canon over legislative history—and even over some of the more clever uses of textual canons and thin textual arguments supporting "plain" meanings.[22]

18. *See, e.g.*, Li v. Yellow Cab Co. of Cal., 532 P.2d 1226 (Cal. 1975).

19. *See, e.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

20. Gluck's own evidence from Texas is very suggestive: the highest civil courts and criminal courts in the state cannot reach methodological consensus. *See* Gluck, *supra* note 1, at 1787-91. Might this be because criminal law is different? And what does that tell us about the quest for unified field theory?

21. *See* Muscarello v. United States, 524 U.S. 125 (1998).

22. Of course, Gluck's modified textualism privileges legislative history over canons, as we clarify in Part II. As applied to all statutory contexts, modified textualism would necessarily result in the search for legislative intent over the application of the hoary canon of the Rule of Lenity. We think that calls, at the least, for some independent defense. Gluck might resort, as she often does, to the abstract "rule-of-law" value promoted by a methodological consensus that covers all statutes. But here, as elsewhere, we are underwhelmed by the sure-

Consider *Muscarello v. United States*, a case in which defendants found themselves subject to substantial sentences with mandatory minima.[23] The majority opinion—which was authored by Justice Breyer and joined by Justice Stevens—resorted to purpose and intent to reinforce its conclusion, relegating the Rule of Lenity to an afterthought that could only be utilized in a case of "grievous ambiguity."[24] The textual analysis on display in *Muscarello* veers toward the absurd, with members of the Court citing the King James Bible, *Moby Dick*, *Robinson Crusoe*, the *New York Times*, an ad hoc study conducted on Lexis/Nexis, and M*A*S*H to divine what the word "carry" means. Surely, it would be an improvement in the realm of criminal law not to let the fate of a defendant's sentence turn on whether we can conjure an unambiguous meaning out of this patchwork of sources. If a consensus regime subordinates the Rule of Lenity to the search for congressional intent—as modified textualism and even Justices Stevens's and Breyer's intentionalism—we are left with a more punitive society. And if that is a choice our society would like to make, it should be made explicitly, and not as an afterthought or an entailment of a general theory of statutes.

Furthermore, there are other statutory contexts where public choice realities might demand focus on the text or the "deal"—or, alternatively, where they might require reinforcing the representation of those who had little access to the political process that gave rise to the statute.[25] It would be a significant loss for our legal system if an interpretive regime could not allow debate about the etiology of a statute. Did an interest group write the statute? Is it shifting the costs of its gains from the statute onto an unorganized and underrepresented public? If pharmaceutical companies buy themselves a statute with lobbying and campaign donations, and that statute threatens public health, would we not want judges to be sensitive to this process point?[26] Singular interpretive philosophies cannot meaningfully consider nuances of public choice or legislative procedure as meaningfully as our current system of interpretive diversity can. That loss of sophistication may not be worth whatever benefits interpretive consensus produces.

Consider also "super-statutes" passed by legislatures, where overarching policy objectives drive so much of the relevant statutory regimes that judges

footedness of the claim that singular hierarchical interpretive regimes—even when they seem like a mismatch for a whole class of statutes—contribute to the rule of law.

23. *Muscarello*, 524 U.S. at 125.

24. *Id.* at 139.

25. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

26. *See, e.g.*, Perez v. Wyeth Labs., 734 A.2d 1245 (N.J. 1999).

fail in their roles if they refuse to carry out the underlying purpose of the statutory scheme.[27] It is, of course, often difficult to tell when judges have super-statutes before them. But there are some easy cases, and singular interpretive regimes can disable interpreters from having an important conversation about the type of product they are examining. This is a cost of consensus that we do not believe is worth paying: judges should not be closing their eyes to the mobilized deliberation and momentous acts that Congress passes on behalf of the people. The Civil Rights Act of 1964,[28] the Voting Rights Act of 1965,[29] and the Endangered Species Act of 1973[30] are not run-of-the-mill statutes that should be subject to the same regime as the most recent minor amendments to the tax code. Judges should not be indifferent to acts that are quasi-constitutional and constitute us as a people. Interpretive diversity has allowed judges to be sensitive to these differences in the past; it would, accordingly, impose a significant cost on our system to lock judges into only one regime.[31]

For another striking example, consider the mechanisms of direct democracy and statutes produced through initiatives and referendums.[32] It is not hard to see how interpreting these enactments might benefit from a more flexible approach than a one-size-fits-all interpretive regime can offer. Unlike legislatures, the people in direct democracy often lack the competence to read the lengthy statutory product placed before them; statutes can be full of legalese with little context, forcing citizen to use cues, summaries, and simplifications furnished by legislative analysts, interest groups, the mass media, and proponent and opponent campaigns. Thus, when the people enact a measure through direct democracy, voters' intent rarely corresponds to the text of the actual statute. By contrast, legislatures, though they may choose not to read the statutes they pass, at least plausibly can be imputed to enact the

27. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

28. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (2006)).

29. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

30. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C. (2006)).

31. *See* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009) (showing very different uses of legislative history and canons in two very different statutory contexts).

32. *See* Ethan J. Leib, *Interpreting Statutes Passed Through Referendums*, 7 ELECTION L.J. 49 (2008).

specific text of a law. Accordingly, a simplistic textualism or intentionalism would be troubling in the context of direct democracy.[33] Or consider the problem of criminal laws (such as three-strikes laws) passed through direct democracy, which reveal complex interactions between different statutory contexts that may call for even more refined and subtle thinking about how to approach a particular statute. With the proliferation of contexts and "intersectional" statutes, singular approaches look less and less viable.

Finally, compare the class of new statutes to the class of old statutes. It seems plausible that we would want courts to feel a little freer to update older statutes than newer statutes where a contemporaneous majority has just spoken to a statutory question. Might we not feel that more judicial deference is warranted to newer statutes than older ones? Doesn't asking judges to update obsolete statutes that have not been updated for public choice reasons seem less offensive than asking judges to rewrite clear policy choices that have been made explicitly and recently? While there are no easy answers to these questions, they reveal that real debates and meaningful dimensions of analysis could be lost if consensus reins.[34] Ultimately, we doubt that respecting interpretive diversity can lead to any generalized form of methodological consensus.

We think that we have made a strong case for protecting interpretive dissensus from any generalized, one-size-fits-all approach to methodological stare decisis. But after analyzing the specifics of the Gluck's interpretive

33. We do not think this is the place to resolve exactly how statutes passed through direct democracy ought to be interpreted. It suffices for our purposes to note the procedural and substantive differences that arise in this context and suggest that a singular interpretive regime to control questions in all statutory contexts is unappealing. For the main articles in the field proposing individualized regimes, specific canons, and particular ways to navigate the miasma of text, intent, purpose, constitutional norms, and policy in the direct democracy context, see Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477; Evan C. Johnson, People v. Floyd*: An Argument Against Intentionalist Interpretation of Voter Initiatives*, 45 SANTA CLARA L. REV. 981 (2005); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretative Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 110, 114 (1995); Glenn C. Smith, *Solving the "Initiatory Construction" Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257 (2007); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748 (2005). *But see* Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals To Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487 (1998) (arguing that direct democracy does not present the need for a specialized interpretive regime).

34. *See* David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010) (finding empirical evidence that courts use legislative history differently depending on the age, length, complexity, obscurity, and number of times a statute has been amended).

regime, Part II will apply the lessons learned here to show why "modified textualism" in particular would suffer from many of the deficiencies we have identified.

II. "MODIFIED TEXTUALISM" AND ITS DISCONTENTS

In this Part, we briefly summarize "modified textualism" (Section II.A) and then discuss why we find the regime to be an unpalatable alternative to dissensus. Either it will fail (Section II.B) and transform the current debates scholars and jurists have about statutory interpretation into debates about what is "ambiguous" (which is itself costly and counterproductive); or, it will work (Section II.C), and then undermine the benefits described above that accrue to systems that tolerate interpretive diversity and dissensus.

A. Gluck's Modified Textualism Defined

Gluck presents "modified textualism" as a three-tiered approach to statutory interpretation. In "step one," the judge begins the interpretive process with the text and the text alone. If the judge identifies a textual ambiguity, he or she may then review the legislative history of the enactment at the second stage of analysis. Ambiguity serves as a gatekeeper, restricting the use of legislative materials until the judge has demonstrated that the text is unclear. If in "step two" the judge is unable to extract a clear interpretation, finding the legislative history ambiguous, the judge may then employ the use of substantive canons of construction. Similar to the barrier between text and legislative history, ambiguity once again serves as the gatekeeper to using canons in "step three."

In sum, modified textualism creates a fixed hierarchical system, which requires judges to justify their movement outside of the text and then legislative history by establishing indicia of ambiguity. Initially, the framework appears clean, simple, and straightforward. But appearances can be misleading. Indeed, the practice of modified textualism—by Gluck's own account—reveals that there is much more going on.

B. Shifting the Battleground Is Not Real Progress in the War

While modified textualism's major selling point is increased predictability in the judicial process for hard cases, it is unlikely to achieve it. Modified textualism's three-step analysis merely replaces the traditional debate over the most appropriate application of legitimate interpretive techniques with a new battle over textual ambiguity and over ambiguity in legislative history. And

without guidance to help judges understand the threshold inquiry into ambiguity that is supposed to constrain them, the benefits of curbing judicial discretion vanish. Detached from the help of any extrinsic aids, textual analysis and debating whether something is ambiguous may promote even more unbridled judicial decision by intuition.

Under modified textualism, then, it seems possible that considerable judicial resources will be expended debating gatekeeper findings about ambiguity rather than debating the best meaning of a statute in its context. And, as we are learning empirically and in case law, the concept of ambiguity is itself quite ambiguous—and perceptions of ambiguity are ultimately colored by matters extrinsic to the underlying source material alone, whether that is because of cognitive impairments or ideological handiwork.[35] Given how ripe for manipulation findings of ambiguity can be, this resiting of the debate about statutory interpretation is a loss of energy without the net gain that might be possible by debating with the full range of goals and methods of statutory interpretation generally available. Forcing judges into debates about ambiguity risks trapping them in an unproductive set of disagreements, which we are learning empirically can be colored by policy preferences.[36] Unfortunately for modified textualism, the evidence seems to bear out that this is a substantial new battleground for jurisdictions that embrace the unified methodology.[37] Putting this much pressure on threshold tests is a practical and substantial cost of consensus with nary a benefit to counterbalance it.

35. *See* Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity*: *An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 1 (2010); J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81 (2000).

36. An illuminating set of comments on Farnsworth et al., *supra* note 35, by notable scholars and judges can be found at: *Ambiguity in Legal Interpretation: A Debate*, U. CHI. L. SCH. FAC. BLOG (Apr. 23, 2010, 11:45 AM), http://uchicagolaw.typepad.com/faculty/2010/04/ambiguity-in-legal-interpretation-a-debate.html.

37. A careful reading of Gluck's own case studies shows that this dynamic is already in place in the states that adopt some version of modified textualism. *See, e.g.*, Gluck, *supra* note 1, at 1775 n.80 (Oregon cases argue about the existence of meeting the threshold ambiguity); *id.* at 1790 (Texas courts "aggressively search[] for ambiguity in statutes"); *id.* at 1793 n.156 (The Connecticut Supreme Court recognizes "the manipulability of any ambiguity threshold"); *id.* at 1795 (Connecticut uses the "absurd results" exception broadly to enable consultation with extra-textual materials); *id.* at 1795-96 (In 2008, Connecticut found ambiguity in 28 out of 37 cases to avoid "plain meaning"); *id.* at 1802-03 (Wisconsin judges argue about ambiguity under modified textualism and whether the ambiguity threshold is attractive); *id.* at 1810-11 (Michigan expends energy on debates about defining ambiguity for their threshold inquiry about whether to admit non-textual sources). In 2009, the Oregon Supreme Court got rid of the ambiguity threshold analysis entirely; it turned out that the game was not worth the candle. *See* State v. Gaines, 206 P.3d 1042 (Or. 2009).

As we suggested in Part I, it is also important to highlight that fixed interpretive regimes may be unnecessary in the bulk of easy cases. Consider the view of the former Chief Judge of the Second Circuit:

> Easy cases are resolved short of litigation or settled early; the costs of litigation normally filter them out, leaving appellate judges with the hard decisions. The statutory issues presented in the cases we must decide . . . include instances where the phrase at issue, while seemingly of one clear meaning, seems odd or incoherent when applied to the situation at hand; cases in which a provision admits of multiple meanings, each leading to different consequences; and those in which a statute is unclear because its commands are not precise, contains contradictory provisions, or is in conflict with another statute.[38]

Thus, modified textualism might provide the most assistance in the easy cases where the least help is needed. But it might just as well produce incorrect results in those easy cases because of the blindfold that requires keeping probative and convincing evidence out of view. The unwillingness of modified textualism to allow legislative history to be utilized for *confirmatory* rather than expansionary uses is a quite substantial cost that may very well impair decisionmaking in easy cases.[39] And analysis is likely to be manipulated in the hard cases, where there is little evidence that judges implementing modified textualism are reaching better, sounder, more appropriate, or more thoughtful opinions.

Indeed, a serious problem with Gluck's assessment that modified textualism is normatively attractive is that it is difficult to know which metrics to use to assess whether the courts that embrace interpretive consensus are reaching "better" results. She never gives us any sense about how to render judgment about what counts as "better" decisions. Better for the social and public good? Better for an efficient legislative process? Better for efficient judicial docket management? Gluck needs to define "better" so that someone can test her theory. It strikes us that, because any one metric feels forced and

38. John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 203-04 (2001).

39. The classic examples from the Supreme Court where the court adopts a "soft plain meaning" approach—allowing a peek at legislative history to confirm a textual meaning—include *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The point is not that these decisions were necessarily correct, only that they were more fully reasoned than modified textualism would allow because they seek to use legislative history to confirm their textual arguments. Thanks to Jim Brudney for the point.

incomplete, a multitude of methodologies is most likely to address the variety of values at stake.

Ultimately, the easy cases hardly require elaborate theorizing, and the hard cases may be harder to control than by merely providing judges a checklist as a cover for struggling with ambiguities. In sum, modified textualism's gatekeepers between its steps of analysis all but guarantee that it will not be able to fulfill its promise of certainty, predictability, and "better decisions."

C. Consensus Pushes the Interpretive Debate Behind Closed Doors

There is an even larger cost, however, that we attribute to a modified textualist regime if it does work to constrain judges from looking at extra-textual sources in hard cases: it is likely to promote a cleavage between actual judicial thought processes and their outward manifestations in opinion-writing. Because opinion-writing will be constrained by a rhetoric that conceals the substantive debate at stake in the hard cases, modified textualism will lead to judges shielding analysis of why cases were really decided. Interpretive candor is one of the core values of dissensus we identified in Part I—and we elaborate upon it here, using modified textualism as a case study.

The current interpretive debate taking place in our courts generally centers on the proper role of the judiciary in our constitutional system and on the nature of the court's relationship with Congress. This is a healthy debate for our courts to have; as Justice Thomas put it recently, it "strengthens and informs our legal system."[40] Modified textualism, however, effectively ends this debate and orders those judges who believe legislative history is a useful and constitutionally permissible interpretive aid to ignore it until they are satisfied that a requisite level of ambiguity has been met. But we doubt that judges and law clerks would follow modified textualism's commands in their chambers, even if their opinions are written formalistically or hierarchically in order to adhere to the methodological command. Indeed, it is hard to imagine judges ignoring legislative history until they are completely convinced of a text's ambiguity.

In this light, consider Judge Randolph's view of the matter, which suggests that hierarchical methodological consensus is unlikely to impact brief-writing, might not effect all the cost savings imputed to it, and could lead to a gulf between legal reasoning and opinion-writing:

40. Stephanie Condon, *Clarence Thomas: State of the Union Too Partisan for a Justice*, POL. HOTSHEET (Feb. 4, 2010, 4:46 PM), http://www.cbsnews.com/8301-503544_162-6174857-503544.html.

> Nearly every brief I see in cases involving issues of statutory construction contains a discourse on legislative history. . . . Counsel can never be sure that the court will find the words plain, and stop there. . . . Judges read those briefs from cover to cover . . . . Somewhere during the reading, preliminary views begin to form. When the reading is done and the case has been analyzed and argued, how can it be said that the judge turned to the legislative history only after finding the statutory language ambiguous? The judge himself often cannot identify exactly when his perception of the words actually jelled.[41]

Thus, the text in the hard cases will still be viewed by many judges through the lens of legislative history. But under modified textualism, judicial opinions must hide this fact: judges and clerks who write opinions will feel constrained to stick to the party line and write using a checklist. Those opinions will mislead readers about how the court reached its decision, which is not fair either to the parties or to the legal system. And it provides little guidance for those seeking to understand how the law will be interpreted in the future. As has been documented in English courts, prior to *Pepper v. Hart*'s lifting of the exclusionary rule that disallowed citation to legislative history, judges admitted to consulting extra-textual evidence of meaning even while they refused to cite it so as to abide by the rule.[42]

In sum, judges' desire to be fair to the parties before them is likely to have a greater influence on judicial decisionmaking than any inflexible theory or method derived from stare decisis. As Judge Walker explains, "Even a judge's strongest theoretical inclinations are tempered by the judge's desire to accord a fair hearing to the parties' arguments and to be open to all credible materials that might enhance the judge's understanding of the case."[43] So modified textualism's advice to the clerks and judges writing opinions may very well be to dissemble and reshuffle how a result was reached in order to fit a "fair" decision into the strictures of methodological stare decisis. This kind of rule of law gives law a bad name.

41. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 76 (1994). For a discussion of the possibility that clerks end up cobbling together an opinion that may or may not reflect the actual thinking of the judge, see Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 26-27 (1993).

42. Davis v. Johnson, [1979] A.C. 264 (H.L.) 276-77 (U.K.), *cited in* James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 9 n.32 (2007).

43. Walker, *supra* note 38, at 232-33.

CONCLUSION

Abbe Gluck's thoughtful and well-researched article attempts to settle a long-standing debate in statutory interpretation by trying to call a truce somewhere between textualism and purposivism. We think this compromise fails. By overstating the benefits of consensus and the costs of dissensus, she has occluded from view the real and substantial costs of consensus and benefits of dissensus. Inviting a rigid and possibly misleading application of a "rule" rather than living with vague but somewhat more honest standards is not a choice that we think the legal system should make. When the fuller cost-benefit analysis is added to the mix—as we have attempted to do here—there is a much stronger case to be made for letting sleeping dogs lie. We have achieved a modus vivendi in statutory interpretation—whatever vituperative footnotes appear in the case law from time to time and however many pages are devoted to the interpretation wars in law reviews—and it is working just fine. In fact, it is working better than fine; it is keeping the legal system vital.

Ethan J. Leib is a Visiting Associate Professor of Law at UC Berkeley and Professor of Law at UC Hastings College of the Law. Michael Serota is a recent graduate of UC Berkeley Law and will be clerking at the United States Court of Appeals for the Armed Forces this fall. *The authors thank Jim Brudney, Abbe Gluck, Kent Greenawalt, Rick Hasen, Rick Hills, Todd Rakoff, Michelle Singer, David Zaring, and the members of Professor Leib's Legislation class at Berkeley during the Spring of 2010 for their thoughts and comments about the subjects in this Essay. This Essay is dedicated to the memory of Philip Frickey, who inspired and encouraged this project but did not live to see its completion.*

Preferred citation: Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010), http://yalelawjournal.org/2010/7/30/leib_serota.html.